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December 8, 1995

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BY HAND

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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DEC - 8 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RE: In the Matter of Radiofone Inc.'s
Emergency Petition for Rulemaking

Dear Mr. Caton:

Enclosed please find the original and four (4) copies of Radiofone's
Emergency Petition for Rulemaking for filing with the Commission.

If you should have any questions regarding this matter, kindly direct
them to the undersigned.

Yours truly,


Ashton R. Hardy

ARH/mv
Enclosures

cc: All Commissioners
William Kennard

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

**RADIOFONE INC.'S EMERGENCY
PETITION FOR RULEMAKING**

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DEC - 8 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

EMERGENCY PETITION FOR RULEMAKING

Radiofone, Inc. (Radiofone), by its attorneys and pursuant to Section 1.401 of the Commission's rules, 47 C.F.R. § 1.401, hereby petitions the Commission to initiate an immediate rulemaking proceeding to amend Sections 24.204 (hereinafter referred to as the "cellular-PCS cross-ownership rule") and 20.6 (hereinafter referred to as the "45 MHz spectrum cap") of the Commission's Rules, 47 C.F.R. §§ 20.6 and 24.204, as well as any other rules that would prevent an entrepreneur (as described in Section 24.709 of the Commission's Rules, 47 C.F.R. § 24.709) from obtaining a 30 MHz PCS license in its cellular service area. (A copy of the cellular-PCS cross-ownership rule and the 45 MHz spectrum cap is enclosed as Exhibit A.) A further rulemaking proceeding is required in order for the Commission to comply with the recent decision of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in Cincinnati Bell Tel. Co. v. FCC, No. 94-3701, slip op. (6th Cir. Dec. 1, 1995) (mandate issued). The Sixth Circuit determined that the Commission's cellular-PCS cross-ownership rule arbitrarily prevented small cellular companies, such as Radiofone, from obtaining 30 MHz PCS licenses in their cellular service areas, and the

Court directed the Commission to develop rules consistent with the Court's opinion. Radiofone submits that, in implementing the Sixth Circuit's directions, it is necessary and in the public interest that the Commission act expeditiously to amend the cellular-PCS cross-ownership rule, the 45 MHz spectrum cap and any related rules to ensure that they do not have the effect of frustrating the Sixth Circuit's order.

As discussed below, Radiofone submits that a full notice and comment rulemaking proceeding is not needed in order for the Commission to amend these two rules. However, if the Commission were to determine that such rulemaking is required, Radiofone requests that the Commission promptly initiate the proceeding so that amendments may be made before the commencement of the C Block PCS auction in order to avoid serious disruption of the auction process and concomitant harm to the auction participants and the public interest. Concurrent with the filing of this Emergency Petition, Radiofone is requesting the Commission to stay the C Block PCS auction pending the Commission's action to amend the rules or the completion of the rulemaking.

THE NEED TO AMEND THE RULES

The terms of the cellular-PCS cross-ownership rule and 45 MHz spectrum cap would, if applicable, preclude Radiofone and its affiliates from obtaining 30 MHz PCS licenses in their cellular service areas. The Sixth Circuit's opinion in Cincinnati Bell requires the Commission to reevaluate the cellular-PCS cross-ownership rule, and necessarily has the effect of requiring the FCC to reexamine the 45 MHz spectrum cap

and any other rules that would prevent small cellular companies from obtaining 30 MHz PCS licenses. The court stated:

Before the FCC may foreclose such businesses as Radiofone from obtaining a thirty MHz Personal Communications Service license within their geographic region, it must provide something in the way of documentary support for its asserted fears that Cellular providers will detrimentally affect the market if allowed to become Personal Communications Service licensees.

Cincinnati Bell, at 21 (emphasis added). The C Block auction represents the only remaining 30 MHz PCS auction. Thus, because the rules in question "foreclose such businesses as Radiofone from obtaining a thirty MHz Personal Communications Service license within their geographic region," the FCC must reexamine them in order to comply with the Sixth Circuit's mandate.

The need to reexamine the cellular-PCS cross-ownership rule, the 45 MHz spectrum cap and any similar rules also results from the impact that they would have on cellular companies. The Sixth Circuit noted that impact when it stated:

The Cellular eligibility restrictions have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture. The amounts of money at stake reach into the billions of dollars. The continued existence of some wireless communications businesses rests on their ability to bid on Personal Communications Service licenses. Indeed, at oral argument counsel for the FCC admitted that, given the uncertain nature of the future in the wireless communications market, Cellular providers foreclosed from obtaining Personal Communications Service licenses may ultimately be left holding the remnants of an obsolete technology.

Id. at 20. The Sixth Circuit's language repeatedly makes it clear that any rules that would arbitrarily imperil the continued existence of small cellular providers are

impermissible; therefore, the Commission must promptly notice a rulemaking to reexamine those rules.

The need to re-examine the 45 MHz spectrum cap also is based on the Sixth Circuit's rejection of the Commission's arguments concerning the two-fold purpose of the cellular-PCS cross-ownership rule: (a) preventing cellular carriers from behaving anticompetitively; and (b) promoting diversity of license ownership. See id. at 17, 20. These purposes are also the purposes of the 45 MHz spectrum cap. The Commission's Third Report and Order (Implementation of Sections 3(n) and 332 of the Communications Act), 9 FCC Rcd. 7988, 8108-10 (1994), states that the purpose of the 45 MHz spectrum cap is to prevent cellular carriers from artificially withholding capacity (i.e., behaving anticompetitively) and to promote diversity of license ownership. Thus, the underlying rationale of the 45 MHz spectrum cap and the cellular-PCS cross-ownership rule is virtually the same, and that rationale was rejected as arbitrary by the Sixth Circuit, Cincinnati Bell, at 17-21. Therefore, because the 45 MHz spectrum cap is clearly based on the same faulty justifications as the cellular-PCS cross-ownership rule and will have the same impact when applied to Radiofone and other small cellular carriers, it should be reevaluated and modified as necessary, consistent with the compelling public interest concerns raised by the Sixth Circuit.

The situation faced by the Commission in light of the Sixth Circuit's decision in Cincinnati Bell is similar to the one it faced after the United States Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995). There, the

Commission recognized the need to immediately hold a rulemaking proceeding to modify its C Block auction rules and all related rules that contained preferences for minorities and women, even though the court in Adarand had not directly addressed any of those rules. The FCC issued its Further Notice of Proposed Rulemaking (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 78 R.R.2d 950, 950 (1995), only 11 days after Adarand was decided. The FCC stated:

Based on the unique circumstances of the auction for licenses in the "C block" of Personal Communications Services in the 2 GHz band ("broadband PCS"), particularly the timing of the Supreme Court's decision in Adarand, we believe that our proposal to avoid further delay and legal uncertainty concerning the C block auction is the best means of providing opportunities for businesses owned by minorities and women, many of whom have made preparations to bid in the C block auction.

Id. (emphasis added). The FCC was careful to live up to the spirit of the Adarand decision by modifying all relevant rules. Thus, after Adarand, the FCC recognized the need to make all of the rules clear before commencing the auction.

In this case, the requirement that the Commission engage in a broad reexamination of all of its rules respecting cellular and PCS cross-ownership is even more apparent, since the court's opinion directly addresses the policies that underlie those rules. And, just as in Adarand, the rule changes must be made before the C Block auction proceeds, in order to remove legal uncertainty that would harm the public and auction participants, and in order to comply with the court's order.

Radiofone submits that the Commission could make the rule changes without instituting a full notice and comment rulemaking. Such action would be consistent with the Commission's response to the decision in Bell Atlantic Tel. Cos. v. FCC, 24

F. 3d 1441 (D.C. Cir. 1991). There, the Commission adopted a decision on remand in which it changed the Expanded Interconnection rules without instituting a notice and comment rulemaking. Memorandum Opinion and Order (Expanded Interconnection), 9 FCC Rcd. 5154, 5156 (1994). Here, the Commission could reconsider the record in the previous rulemaking proceedings in light of the Sixth Circuit's opinion, and amend the rules as suggested below without conducting further rulemaking. However, if the Commission were to determine that a full notice and comment rulemaking proceeding is needed to make these rule changes, Radiofone hereby requests the initiation of such proceeding.

SUGGESTED AMENDMENTS

Regardless of whether the rule changes are made with or without prior notice and comment, the Commission clearly must re-examine the cellular-PCS cross-ownership rule. Radiofone submits (and the Court has found) that there is no record support for the Commission's asserted fears that small cellular providers such as Radiofone will act anti-competitively if permitted to obtain 30 MHz PCS licenses. Radiofone therefore submits that one step towards correcting the invalid rule without unduly delaying the upcoming C Block PCS auction is to change the cellular-PCS cross-ownership rule, so that it does not apply to "such businesses as Radiofone" (as required by Cincinnati Bell, at 21) in the C Block PCS auction.¹ Such exemption

¹The Commission similarly made modifications that applied only to the C Block PCS auction when it adopted the Sixth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 78 R.R.2d 934 (1995).

would also be consistent with the FCC's mandate to ensure that small businesses are given the opportunity to participate in PCS. 47 U.S.C. § 309(j)(3)-(4).

Thus, the new Section 24.204(g) should state:

Notwithstanding the foregoing, C Block 30 MHz PCS licenses may be granted to parties (including all parties under common control) regardless of any overlap of the PCS licensed area (i.e., the BTA) and the cellular geographic service area (CGSA) of licensee(s) in the Domestic Public Cellular Radio Telecommunications Service directly or indirectly owned, operated, or controlled by the same party.

The 45 MHz spectrum cap also should be amended so that it does not function as a cellular-PCS cross-ownership rule for small cellular companies, such as Radiofone. Such amendment would be consistent with the Sixth Circuit's statement that the FCC may not foreclose "such businesses as Radiofone" from obtaining 30 MHz PCS licenses, Cincinnati Bell, at 21, and would be consistent with the FCC's mandate to ensure that small businesses are given the opportunity to participate in PCS, 47 U.S.C. § 309(j)(3)-(4).

Thus, the new Section 20.6(f) should state:

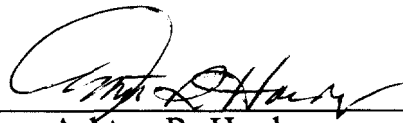
Notwithstanding the foregoing, ownership and other interests in C Block broadband PCS licenses shall not be attributed to anyone holding attributable ownership and other interests in cellular licenses where there is a significant overlap between the cellular service area and the PCS service area and where the cellular licensee satisfies the assets and revenues standards provided in Section 22.709 of the Commission's Rules.

If the Commission were to amend the cellular-PCS cross-ownership rule and the 45 MHz spectrum cap, as suggested above, Radiofone and its affiliates would be able to obtain 30 MHz PCS licenses in their cellular service areas, consistent with the Court's findings.

CONCLUSION

The Commission has already demonstrated its ability to act quickly by conducting the expedited rulemaking after Adarand, which resulted in its adoption of the Sixth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 78 R.R.2d 934 (1995). Radiofone submits that, in light of the Sixth Circuit's opinion in Cincinnati Bell, the Commission must act just as quickly to amend the cross-ownership rule, the 45 MHz spectrum cap and any other rules that would contravene the Sixth Circuit's order. Although Radiofone submits that further rulemaking is not needed, Radiofone requests the institution of a rulemaking proceeding if the Commission were to determine otherwise.

Respectfully submitted,
RADIOFONE, INC.


By: Ashton R. Hardy
Michael Lamers

Its Attorneys

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December 8, 1995

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EXHIBIT A

SECTION 20.6 - 45 MHz SPECTRUM CAP

(a) 45 MHz limitation. No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS (see 20.9) shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area.

(b) SMR spectrum. To calculate the amount of attributable SMR spectrum for purposes of paragraph (a) of this section, an entity must count all 800 MHz channels and 900 MHz channels located at any SMR base station inside the geographic area (MTA or BTA) where there is significant overlap. All 800 MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz paired), and all 900 MHz channels located on at least one of those identified base stations count as 25 kHz (12.5 kHz paired), except that no more than 10 MHz of SMR spectrum in the 800 MHz SMR service will be attributed to an entity when determining compliance with the cap.

(c) Significant overlap.

(1) For purposes of paragraph (a) of this section, significant overlap of a PCS licensed service area and CGSA(s) (as defined in 22.911 of this chapter) or SMR service area(s) occurs when at least 10 percent of the population of the PCS licensed service area, as determined by the 1990 census figures for the counties contained therein, is within the CGSA(s) and/or SMR service area(s).

(2) The Commission shall presume that an SMR service area covers less than 10 percent of the population of a PCS service area if none of the base stations of the SMR licensee is located within the PCS service area. For an SMR licensee's base stations that are located within a PCS service area, the channels licensed at those sites will be presumed to cover 10 percent of the population of the PCS service area, unless the licensee shows that its protected service contour for all of its base stations covers less than 10 percent of the population of the PCS service area.

(d) Ownership attribution. For purposes of paragraph (a) of this section, ownership and other interests in broadband PCS licensees, cellular licensees, or SMR licensees will be attributed to their holders pursuant to the following criteria:

(1) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee shall be attributed, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to at least 40 percent of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee if the ownership interest is held by a small business, a rural telephone company or a business owned by minorities and/or women, as these terms are defined in 1.2110 of this chapter or other related provisions of the Commission's rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women. For purposes of broadband PCS licenses for frequency block C, the 40 percent attribution levels shall only apply to interests held by a small business or a rural telephone company and interests held by an entity with a non-controlling equity interest in a licensee or applicant that is a small business.

(3) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock to any person who has the sole power to sell such stock, and, in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(4) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2) of this section.

(5) Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected, except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in 1.2110 of this chapter or other related provisions of the Commission's rules.

(6) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(7) Officers and directors of a broadband PCS licensee or applicant, cellular licensee, or SMR licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a broadband PCS licensee or applicant, a cellular licensee, or an SMR licensee shall be considered to have an attributable interest in the broadband PCS

licensee or applicant, cellular licensee, or SMR licensee.

(8) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(9) Any person who manages the operations of a broadband PCS, cellular, or SMR licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee, if such person, or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (i) the nature or types of services offered by such licensee; (ii) the terms upon which such services are offered; or (iii) the prices charged for such services.

(10) Any licensee or its affiliate who enters into a joint marketing arrangement with a broadband PCS, cellular, or SMR licensee, or its affiliate shall be considered to have an attributable interest, if such licensee, or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (i) the nature or types of services offered by such licensee; (ii) the terms upon which such services are offered; or (iii) the prices charged for such services.

(e) Divestiture. Any party holding controlling or attributable ownership interests in SMR licensees accounting for more than 5 MHz of SMR spectrum may be a party to a broadband PCS application (i.e., have a controlling or attributable interest in a broadband PCS applicant), and such PCS applicant will be eligible for PCS licenses amounting to 40 MHz of broadband PCS spectrum in a geographical area, pursuant to the divestiture procedures set forth in paragraphs (e)(1) through (e)(3) of this section.

(1) The Broadband PCS applicant shall certify on its bidder application that it and all parties to the application will come into compliance with the limitations on spectrum aggregation set forth in this section.

(2) If such an applicant is a successful bidder, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the limitations on spectrum aggregation set forth in this section.

(3) If such an applicant is otherwise qualified, its application will be granted subject to a condition that the licensee shall come into compliance with the

limitations on spectrum aggregation set forth in this section within ninety (90) days of final grant.

(i) Parties holding controlling interests in SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the SMR licensee (see 90.158 of this chapter) by which, if granted, such parties no longer would have an attributable interest in the SMR license. If no such assignment or transfer application is tendered to the Commission within ninety (90) days of final grant, the Commission may consider the short-form certification and the long-form divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the PCS license, cancelling it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit.

(ii) Where parties to broadband PCS applications hold less than controlling (but still attributable) interests in SMR licensee(s), they shall submit, within ninety (90) days of final grant, a certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section.

NOTE 1: For purposes of the ownership attribution limit, all ownership interests in operations that serve at least 10 percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular or SMR ownership.

NOTE 2: When a party owns an attributable interest in more than one cellular or SMR system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.

SECTION 24.204 - PCS-CELLULAR CROSS-OWNERSHIP RULE

(a) 10 MHz Limitation. Until January 1, 2000, no license(s) for broadband PCS in excess of 10 MHz shall be granted to any party (including all parties under common control) if the grant of such license(s) will result in significant overlap of the PCS licensed service area(s) (MTAs or BTAs) and the cellular geographic service area(s) (CGSA) of licensee(s) in the Domestic Public Cellular Radio Telecommunications Service directly or indirectly owned, operated, or controlled by the same party.

(b) 15 MHz Limitation. After January 1, 2000, no license(s) for broadband PCS in excess of 15 MHz shall be granted to any party (including all parties under common control) if the grant of such license(s) will result in significant overlap of the PCS licensed service area(s) (MTAs or BTAs) and the cellular geographic service area(s) (CGSA) of licensee(s) in the Domestic Public Cellular Radio Telecommunications Service directly or indirectly owned, operated, or controlled by the same party.

(c) Significant Overlap. For purposes of paragraphs (a) and (b) of this section, significant overlap of a PCS licensed service area and CGSA(s) occurs when ten or more percent of the population of the PCS service area, as determined by the 1990 census figures for the counties contained therein, is within the CGSA(s).

(d) Ownership Attribution.

(1) For purposes of paragraphs (a) and (b) of this section, "control" means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) For purposes of applying paragraphs (a) and (b) of this section, and for purposes of paragraph (c) of 24.229 (40 MHz limit in same geographic area), ownership and other interests in broadband PCS licensees or applicants and cellular licensees will be attributed to their holders pursuant to the following criteria:

(i) Partnership and other ownership interests and any stock interest amounting to 5 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS licensee or applicant will be attributable.

(ii) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee will be attributable, except that

ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to 40 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee if the ownership interest is held by a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in 24.720, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women. For purposes of broadband PCS licenses for frequency block C, the 40 percent attribution levels shall only apply to interests held by a small business or rural telephone company and interests held by an entity with a non-controlling equity interest in a licensee or applicant that is a small business.

(iii) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth above.

(v) Debt and instruments such as warrants, convertible debentures, options or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected, except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in 1.2110 or other provisions of the Commission's Rules.

(vi) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vii) Officers and directors of a broadband PCS licensee or applicant or a cellular licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a PCS licensee or applicant or a cellular licensee shall be considered to have an attributable interest in the broadband PCS licensee or applicant or a cellular licensee.

(viii)

(A) Ownership interests in a cellular licensee or a

broadband PCS applicant or licensee that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. [For example, if A owns 10 percent of Company X, which owns 35 percent of, and controls, Company Y, which owns 25 percent of Licensee, then Company X's attributable interest in Licensee would be 25 percent, and A's attributable interest in Licensee would be 2.5 percent (0.1 x 0.25).]

(B) Notwithstanding paragraph (d)(2)(viii)(A) of this section, the following interests shall not constitute attributable ownership interests for purposes of 24.229(c):

(1) A limited partnership interest held by an institutional investor (as defined in 24.720(h)) where the limited partner is not materially involved, directly or indirectly, in the management or operation of the PCS holdings of the partnership, and the licensee so certifies. The criteria which would assure adequate insulation for the purposes of this certification require:

(i) Prohibiting limited partners from acting as employees of the limited partnership if responsibilities relate to the carrier activities of the licensee;

(ii) Barring the limited partners from serving as independent contractors;

(iii) Restricting communication among limited partners and the general partner regarding day-to-day activities of the licensee;

(iv) Empowering the general partner to veto admissions of new general partners;

(v) Restricting the circumstances in which the limited partners can remove the general partner;

(vi) Prohibiting the limited partners from providing services to the partnership relating to the PCS holdings of the licensee; and

(vii) Stating that the limited partners may not become involved in the management or operation of the licensee. See 47 CFR 73.3555 Note 2(g)(2); Memorandum of Opinion and Order in MM Docket 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum of

Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986).

(2) Institutional investors who held limited partnership interests prior to March 2, 1995 shall be granted one year from that date to amend their limited partnership agreements to comply with the insulation rules and so certify to the Commission. During this transition period, the licensee in which an institutional investor holds an interest shall also certify to the Commission that the institutional investor limited partner(s) are not materially involved, directly or indirectly, in the management or operation of the licensee.

(ix) Any person who manages the operations of a broadband PCS or cellular licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee, if such person, or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (A) the nature or types of services offered by such licensee; (B) the terms upon which such services are offered; or (C) the prices charged for such services.

(x) Any licensee who enters into a joint marketing arrangement with a broadband PCS or cellular licensee, or its affiliate, shall be considered to have an attributable interest, if such licensee has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (A) the nature or types of services offered by such licensee; (B) the terms upon which such services are offered; or (C) the prices charged for such services.

(e) [Reserved]

(f) Cellular Divestiture.

(1)

(i) Parties holding controlling or attributable ownership interests in cellular licensees may be a party to a broadband PCS application (i.e., have a controlling or attributable interest in a broadband PCS applicant), and such PCS applicant will be eligible for more than one 10 MHz broadband PCS license and/or 30 MHz broadband PCS license(s) pursuant to the divestiture procedures set forth in paragraphs (f)(2) through (4) of this section; provided, however, that these divestiture procedures shall be available only to: (A) parties with controlling or attributable ownership interests in cellular licenses where the CGSA(s) covers 20 percent or less of the PCS service area population; (B) parties with attributable interests solely due to management agreements or joint marketing agreements; and (C) parties with non-controlling attributable interests in cellular licenses, regardless of the degree to the CGSA(s) covers the PCS service area population.

(ii) For purposes of this paragraph, a "non-controlling attributable interest" is one in which the holder has less than a fifty (50) percent voting interest and there is an unaffiliated single holder of a fifty (50) percent or greater voting interest.

(2) The broadband PCS applicant shall certify on its short-form auction application, filed in accordance with 24.705, that it and all parties to the application will come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

(3) If such an applicant is a successful bidder, it must submit with its long-form application (see 24.707) a signed statement describing its efforts to date and future plans to come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

(4) If such an applicant is otherwise qualified, its application will be granted subject to a condition that the licensee shall come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section within ninety (90) days of final grant.

(i) Parties holding controlling interests in cellular licensees that conflict with the attribution threshold or service overlap limitations set forth above will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the cellular licensee (see 22.39) by which, if granted, such parties no longer would have an attributable interest in the cellular license. If no such assignment or transfer application is tendered to the Commission within ninety (90) days of final grant, the Commission may consider the short-form certification and the long-form divestiture statement to be material, bad faith misrepresentations and will invoke the condition on the PCS license, cancelling it automatically, retain all monies paid to the Commission, and, based on the facts presented, take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required time frame, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit. The trustee must divest the property within six months from grant of license.

(ii) Where parties to broadband PCS applications hold less-than-controlling (but still attributable) interests in cellular licensee(s), they shall submit, within ninety days of final grant, a certification that the applicant and all parties to the application have come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

NOTE 1: For purposes of the cellular ownership attribution limit, all ownership

interests in cellular operations that serve 10 or more percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular ownership.

NOTE 2: When a party owns an attributable interest in more than one cellular system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.

Example 1: Company A holds a 15 percent non-controlling ownership interest in Cellular Licensee X and a 15 percent non-controlling ownership interest in Cellular Licensee Y. Cellular Licensee X covers 30 percent of the population of the PCS service area and Cellular Licensee Y covers 10 percent of the population of the PCS service area. A broadband PCS applicant in which Company A holds an attributable ownership interest will be eligible for a broadband PCS license or licenses for more than 10 MHz because Company A does not hold attributable ownership interests in cellular operations which together include ten or more percent of the population of the PCS service area.

Example 2: Cellular Company A owns a 45 percent non-controlling interest in cellular license 1, and a 22 percent non-controlling interest in both cellular licenses 2 and 3. Cellular license 1 includes 15 percent of the pops in BTA 1. Cellular license 2 covers 7 percent of the pops in BTA 2 and 5 percent of the pops in BTA 3. Cellular license 3 covers 7 percent of the pops in BTA 3. Together Cellular licenses 1, 2 and 3 cover 9 percent of the pops in MTA 1.

If Cellular Company A is not a designated entity, it can purchase 40 MHz of spectrum in BTA 2 or in MTA 1. It can acquire only 10 MHz in BTA 1 or BTA 3 because it is considered to have ownership interests in 15 percent of the pops in BTA 1 and 12 percent of the pops in BTA 3.

If Cellular Company A wants to acquire 40 MHz of spectrum in BTA 3 it can either agree to divest either cellular license 2 or 3, or it can invest as a non-controlling investor in a PCS license that is held and controlled by a business owned by minorities and/or women.

If Cellular Company A wants to acquire 40 MHz of spectrum in BTA 1 it can agree to divest its interests in cellular license 1. It cannot invest as a non-controlling investor in a business owned by minorities and/or women because its 45 percent ownership of license 1 will be attributed, since it is greater than the 40 percent threshold.

If Cellular Company A is a designated entity, it can acquire 40 MHz of PCS spectrum in every area except BTA 1, where it is considered to have an ownership interest in 25 MHz of spectrum already because it is over the 40 percent threshold.

Example 3: Cellular Company A owns a 45 percent non-controlling interest in cellular license 1 that covers 5 percent of the pops in BTA 1. Cellular Company A also owns a 21 percent non-controlling interest in cellular license 2 that covers 9 percent of the pops in BTA 1. If Cellular Company A is not a designated entity, then it can buy only 10 MHz of spectrum, because it is considered to have an ownership interest of 14 percent of the pops in BTA 1. If it wants to buy 30 MHz it would have to certify before the auction that it will divest either cellular license 1 or 2.

If Cellular Company A is a designated entity, then it would be considered to have an ownership interest in only 5 percent of the pops in BTA 1 and would thus be eligible to buy up to 40 MHz in BTA 1.

Example 4: Company A holds a 10 percent interest in Cellular Licensee 1. Company B holds a 10 percent interest in Cellular Licensee 1. Cellular Licensee 1 covers more than 10 percent of the population of the PCS service area. Neither Company A nor Company B is a designated entity. A PCS entity with interests held by Company A and Company B is ineligible for a 30 MHz PCS license because the attributable ownership in cellular license 1 is 20 percent.

Example 5: Same as Example 4 except that Company A and Company B are designated entities. The PCS entity is eligible for a 30 MHz PCS license because the attributable cellular ownership is less than 40 percent.